No. 80-684

In the Supreme Court of the United States

OCTOBER TERM, 1980

SHELDON PERLUSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether consecutive sentences can be imposed for conspiracy to distribute LSD and distribution of LSD, where the substantive conviction rests on the defendant's criminal liability for the acts of his co-conspirator agents under *Pinkerton* v. *United States*, 328 U.S. 640 (1946).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A23) is reported at 625 F.2d 1371.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1980. A petition for rehearing was denied on September 8, 1980. The petition for a writ of certiorari was filed on October 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of conspiracy to distribute LSD (Count 1), in violation of 21 U.S.C. 846, and distribution of LSD (Count 6), in violation of 21 U.S.C. 841(a)(1).[1] He received consecutive sentences of four years' imprisonment and a five-year term of special parole on Count 1 and three years' imprisonment and a five-year term of special parole on Count 6 (Pet. App. A4, A5 n.4).[2] The court of appeals affirmed (*id.* at A1–A23).

The evidence at trial showed that the defendants were involved in "a large scale LSD manufacturing and distribution operation * * * [that originated with co-defendant] Bachrach's dreams of great wealth"

[1] Co-defendants Peter Wylie and David Bachrach were both convicted on all seven counts charged in the indictment. Co-defendant Donald Goetz was also convicted of the charges against him for his role in the conspiracy; prior to sentencing, Goetz became a fugitive (Pet. App. A3 n.1, A4–A5).

[2] The court of appeals vacated (Pet. App. A23) the special parole term on Count 1 following this Court's decision in *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980).

(Pet. App. A2). In July of 1978, Bachrach discussed with one Alfred Bloch the possibility of "making large amounts of money" (*ibid.*; Tr. 473, 476) by manufacturing and selling LSD (Tr. 473–479). Subsequently, Bachrach paid $2,000 to send Bloch to Poland in an unsuccessful attempt to obtain LSD crystals (Tr. 480–481, 488). After this fruitless venture, Bloch contacted law enforcement officials and informed them of Bachrach's plan (Tr. 479–480). DEA agents instructed Bloch to tell Bachrach about a source in San Francisco that could provide 25 to 100 grams of ET (ergotamine tartrate), a chemical used in the manufacture of LSD (Tr. 483).

On November 24, 1978, Bachrach flew to San Francisco, where he was met at the airport by two undercover DEA agents posing as intermediaries for a supplier of ET. At this meeting, Bachrach told the agents that he wished to obtain between one-half and one kilogram of ET each month for use by a clandestine LSD laboratory located in Berkeley. The parties agreed that Bachrach would be supplied with ET in exchange for LSD. On November 27, 1978, Bachrach gave the agents a sample of 400 units of LSD and a price list for the various types of LSD he could furnish (Tr. 85–108).

On December 1, 1978, Bachrach delivered 30,000 units of LSD to the agents in exchange for a bottle of ET. That same day, co-defendant Wylie gave the bottle of ET to petitioner (Tr. 124–125, 131–138, 726–729). Six days later, Bachrach delivered an additional 2,000 tablets of LSD to the DEA agents at a price of $900 (Tr. 144–145). On January 3, 1979, Bachrach and Wylie supplied another 54,000 units of LSD to the agents in exchange for 100 grams of ET (Pet. App. A4; Tr. 197–200).

In addition to these deliveries of LSD, Bachrach also discussed with the agents whether they could obtain

some additional chemicals needed by the Berkeley laboratory. On January 2, 1979, the agents furnished several of these chemicals to Bachrach. Shortly thereafter, the chemicals were transferred to co-defendant Goetz and then to Wylie, who in turn delivered them to petitioner (Tr. 159–168, 181–188, 732–734, 763–771).

On January 17, 1979, petitioner, using an alias, flew to Portland, Oregon. Upon arriving at the Portland airport, petitioner was met by a man who gave him a package. After unsuccessfully trying to conceal it in his cap, petitioner placed the package in his pocket and immediately flew back to San Francisco (Tr. 435–441, 677–679).

The next day, Bachrach delivered 226,400 units of LSD to the agents in exchange for more ET.[3] Wylie subsequently was given the bottle of ET and thereafter drove to petitioner's residence. Later that day, petitioner and the co-defendants were arrested. Petitioner's residence was searched and a number of chemicals and formulas used in the manufacture of LSD were found (Pet. App. A4; Tr. 231–241, 422–427, 709–716, 771–775, 793–796).

ARGUMENT

Petitioner argues that consecutive sentences were improperly imposed for conspiracy to distribute LSD and distribution of LSD. Although acknowledging the settled doctrine that conspiracy to commit an offense and the underlying substantive offense are separate

[3] This distribution of LSD formed the basis for the substantive offense of which petitioner was convicted.

In total, the agents received more than 300,000 units of LSD with a street value between $500,000 and $1,000,000 (Pet. App. A3–A4; Tr. 242).

crimes that may be cumulatively punished (Pet. 4),[4] he contends that a different rule should apply where the substantive conviction rests on the defendant's criminal liability under *Pinkerton* v. *United States*, 328 U.S. 640 (1946). This contention is without merit.

Contrary to petitioner's assertion (Pet. 8), this issue was resolved in *Pinkerton* itself. As the court of appeals explained (Pet. App. A22 n.15), cumulative penalties were imposed in that case on Daniel Pinkerton, whose conviction for the substantive offense committed in furtherance of the conspiracy was based solely on his involvement in the conspiracy. Moreover, Justice Rutledge argued in dissent, as petitioner argues here, that the effect of the *Pinkerton* decision was "to punish [Daniel] twice for the same offense, namely, agreeing with [the other defendant] to engage in crime. Without the agreement Daniel was guilty of no crime on this record. With it and no more, so far as his own conduct is concerned, he was guilty of two" (328 U.S. at 652). The majority's affirmance of the convictions and sentences in *Pinkerton* manifestly signaled the rejection of this argument. The Court has never doubted the continued validity of *Pinkerton*, and petitioner has presented no reason to reconsider it here.

Moreover, petitioner misconstrues the nature of the *Pinkerton* doctrine. Under *Pinkerton*, the "acts [of one conspirator] in furtherance of the conspiracy are * * * attributable to the others for the purpose of holding them responsible for the substantive offense" (328 U.S. at 647). Thus, a conspirator is "criminally responsible as a principal" for co-conspirators' criminal

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[4] See *Iannelli* v. *United States*, 420 U.S. 770, 777-779 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-595 (1961); *Pereira* v. *United States*, 347 U.S. 1, 11 (1954); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 789 (1946); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (1946).

acts pursuant to the conspiracy (*id.* at 651 (Rutledge, J., dissenting)). Accordingly, petitioner stands convicted of two offenses with distinct elements—conspiracy to distribute LSD, in violation of 21 U.S.C. 846, and distribution of LSD, in violation of 21 U.S.C. 841(a)(1). Nothing in the Double Jeopardy Clause prohibits consecutive sentences for these offenses. And, as the court of appeals correctly observed (Pet. App. A21), there is "nothing in either the [statutes] or the legislative history which would indicate that Congress intended to depart from the general rule that courts can impose separate sentences for the conspiracy to commit an offense and the accomplishment of the substantive offense itself." See also *Curtis* v. *United States*, 541 F.2d 1188, 1189 (5th Cir.), cert. denied, 431 U.S. 908 (1977); *United States* v. *Bommarito*, 524 F.2d 140, 143–144 (2d Cir. 1975); cf. *United States* v. *Sarno*, 456 F.2d 875, 879 (1st Cir. 1972).

Nor is a different result required because both convictions derive from the same operative facts. Although a defendant's participation in a conspiracy subjects him, by operation of law, to criminal liability for substantive offenses committed in furtherance thereof, this in no way obscures the conclusion that the defendant is guilty of separate crimes. In our view, this situation is not meaningfully distinguishable from that presented in *Harris* v. *United States*, 359 U.S. 19 (1959), where the defendant's unexplained possession of heroin served, by means of statutory presumptions, to establish his guilt of separate offenses. See also *Gore* v. *United States*, 357 U.S. 386 (1958). In this case, as in *Harris*, "the *violation*, as distinguished from the direct evidence offered to prove that violation, was distinctly different under each of the respective statutes" (359 U.S. at 23; emphasis in original).

The weakness in petitioner's position is illustrated

by the following example. If Congress enacted a statute expressly setting the maximum penalty for conspiracy to reflect the punishment for any substantive offenses consummated in furtherance of the conspiracy—*e.g.*, that the maximum sentence for conspiracy to distribute LSD shall be 10 years' imprisonment if LSD is actually distributed by the conspirators pursuant to their scheme, and five years' imprisonment if such distribution does not occur—there can be no doubt that this statute would not violate the Double Jeopardy Clause. Cf. *Gore* v. *United States*, *supra*, 357 U.S. 392–393. Yet the hypothetical statute is not materially different from the construction of the federal criminal code in *Pinkerton* that holds each conspirator responsible and subject to punishment for the substantive offenses committed by co-conspirators in accordance with the conspiratorial agreement.

Finally, *United States* v. *Austin*, 529 F.2d 559 (6th Cir. 1976), does not support petitioner's contention that the Double Jeopardy Clause prohibits consecutive sentences for conspiracy and substantive offenses where the substantive conviction is based on the *Pinkerton* doctrine. Indeed, *Austin* did not even involve a *Pinkerton* issue. Rather, *Austin* concerned the commission of certain substantive bribery offenses as well as conspiracy and held only that there is a "merger of offenses" in cases in which "the substantive offenses 'in effect charged the same agreement or concert of action * * *' involving the defendant and other persons as was charged in the conspiracy count." *United States* v. *Fife*, 573 F.2d 369, 373 (6th Cir. 1976), cert. denied, 430 U.S. 933 (1977), quoting *Austin*, 529 F.2d at 564. In contrast to the bribery offenses in *Austin*, the substantive charge in this case did not involve any agreement or concerted action. Moreover, as petitioner concedes (Pet. 7), every other court of appeals to address the issue has rejected the

Austin analysis, and we believe that its reliance on the "same proof" test is squarely inconsistent with this Court's pronouncements that the proper inquiry "focuses on the statutory elements of the offense * * * notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975). See also, *e.g.*, *Illinois* v. *Vitale*, No. 78–1845 (June 19, 1980), slip op. 6; *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977). Accordingly, *Austin* does not justify further review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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